SUPREME COURT, U. S.

To be argued by Blanch Freedman.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

Office-Supreme Court, U.S.
FILED
DEC 30 1966
JOHN F. DAVIS, CLERK

NO. 440

CLIVE MICHAEL BOUTILIER,

Petitioner,

v.

THE IMMIGRATION AND NATURALIZATION SERVICE,

Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND JUDICIAL CIRCUIT

BRIEF FOR PETITIONER

BLANCH FREEDMAN
299 Broadway
New York City, 10007

ROBERT BROWN
305 Broadway
New York City, 10007

Attorney for Petitioner

On the Brief

David M. Freedman
Blanch Freedman

INDEX

Opinion Below 1
Jurisdiction 1
Questions Presented 2
Statutes Involved 2
Statement of the Case 4
Summary of Argument 7
Argument:
Preliminary Statement 9
I. The relevant statutes as here construed and applied denied to petitioner constitutional due process 12
(a) The statute is vague and is not administered in accordance with its language 12
(b) The statute is vague in failing to adequately apprise its meaning to be as contended by respondent, if that is its meaning 15
(c) The statute and/or its administration rests on an untenable assumption 18
(d) Congressional intent cannot be used to defeat due process of law 20
II. The order of deportation is invalid; it rests on an erroneous construction of the term "psychopathic personality" in section 212(a)(4) 21
III. Respondent has failed to establish that petitioner is deportable 29
IV. Section 212(a)(4) has been unlawfully used here as the means to effect petitioner's deportation for a ground that has not been authorized by statute 33
Conclusion 36
Appendix A (Visa Application) 37
Appendix B (Statement by Dr. C. A. Tripp) 43

CASES

Atlantic Insurance Agency v. Jordan, 299 F.2d 758 33
Barber v. Gonzales, 347 U.S. 637 . . . . . 5 fn
Bridges v. Nixon, 326 U.S. 135 . . . . . 5 fn
Brownell v. Shung, 352 U.S. 180 9
Chew v. Colding, 344 U.S. 590 9
Cline v. Frink Dairy Co., 274 U.S. 445 12
Connally v. General Construction Co., 269 U.S. 385 12
Cramp v. Board of Public Instructions, 368 U.S. 279 12
Escobeda v. Illinois, 378 U.S. 478 . . . . . 5 fn
Fleuti v. Rosenberg, 302 F.2d 652 . . . . . 16, 17, 18, 27, 28
Geigow v. Uhl, 239 U.S. 3 . . . . . 33, 35
Jordan v. DeGeorge, 341 U.S. 223 . . . . . 9, 11 fn, 17
Lavoie v. Immigration and Naturalization Service, 360 F.2d 27 16
Lisemba v. California, 314 U.S. 219 12
Lowe v. State, 44 Tex. Cr. R. 224, 70 S.W. 206 11
Massiah v. United States, 377 U.S. 201 . . . . . 5 fn
Matter of Anne-Lise Coppo, Immigration and Naturalization Service, filed No. A-6 845 593 20
Miranda v. Arizona, 348 U.S. 436 5
Powlowec v. Day, 33 F.2d 267 (CA-2) 32
Sherman v. Immigration and Naturalization Service, (12/12/66) 35 Law Week 4053 33
State v. Reidell (Del.) 14 A. 550 11
Sung v. McGrath, 339 U.S. 33 9
Tot v. United States, 319 U.S. 463 . . . . . 12, 18
United States v. Gainey, 380 U.S. 63 18
United States v. Harriss, 347 U.S. 612 . . . . . 12, 17, 21
United States v. Flores-Rodriguez, 347 F.2d 405 . . . . . 28 fn

United States v. Murff, 250 F.2d 436 31
United States v. Romano, 382 U.S. 63 19
United States v. Spector, 343 U.S. 169 21
United States v. Witkovich, 353 U.S. 194 28
United States ex rel Johnson v. Shaughnessy, 336 U.S. 806 . . . . . 29, 31
United States ex rel Knauff v. Shaughnessy, 338 U.S. 537 30
Wong Kam Wo v. Dulles, 236 F.2d 662 (CA-9) . . . . . 27 fn

STATUTES

Act of February 5, 1917, 39 Stat. 875 . . . . . 22, 24
Act of October 3, 1965, 79 Stat. 919 . . . . . 27 fn
Immigration & Nationality Act of 1952, 66 Stat. 163:
Sec. 212 (a)(4), 8 USC 1182 (a)(4) . 2, 9, 10, 13, 20, 21, 22, 33
Sec. 234, 8 USC 1224 . . . . . 3, 13, 29
Sec. 241 (a)(1), 8 USC 1251 (a)(1) 23, 34, 35
Title 28, USC 1254 (1) 1

MISCELLANEOUS

CONGRESSIONAL MATERIALS:

S. Res. 137, 80th Cong., 1st Sess. (1947) 23
S. 3455, 81st Cong., 2nd Sess. (1950) 23, 24, 25
S. 716, 82nd Cong., 1st Sess. (1951) 25
S. 2550, 82nd Cong., 2nd Sess. (1952) 22
H.R. 2379, 82nd Cong., 1st Sess. (1951) 25, 26
H.R. 5678, 82nd Cong., 2nd Sess. (1952) 22, 26
S. Rep. 1515, 81st Cong., 2nd Sess. (1950) 23, 24
S. Rep. 1137, 82nd Cong., 2nd Sess. (1952) 13, 21, 22
H. Rep. 1365, 82nd Cong., 2nd Sess. (1952) 22, 25, 27

OTHER AUTHORITIES:

Dunnaho, Interpreter Releases, Vol. XXXVIII, No. 35, Aug. 7, 1951 23
Funk and Wagnalls College Standard Dictionary, ed. 1941 13
Freud, Letter to An American Mother, American Journal of Psychiatry, Vol. 107, April 1951; reprinted in The Problem of Homosexuality in Modern Society, by Ruitenbeck (E. P. Dutton) 1963 15

Guttmacher, Diagnosis and Etiology of Psychopathic Personality as Perceived in Our Times in Current Problems in Psychiatric Diagnosis (Hoch & Zubin, ed. 1953) 12

Kinsey, Sexual Behavior in the Human Male, (W. B. Saunders Co.) 1948 19

Lindner, Homosexuality and the Contemporary Scene in The Problem of Homosexuality in Modern Society, ed. by Ruitenbeck (E. P. Dutton) 1963 19

Noyes, Modern Clinical Psychiatry, 3d ed. 1941 12

U. S. Code & Cong. and Admin. News, 82nd Cong., 2nd Sess. (1952) 22

United States Public Health Service: Report on the Medical Aspects of HR 2379 . . . . . 24, 25

Webster's Third New International Dictionary, ed. 1961 13

To be argued by Blanch Freedman

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

NO. 440

CLIVE MICHAEL BOUTILIER,

Petitioner,

v.

THE IMMIGRATION AND NATURALIZATION SERVICE,

Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND JUDICIAL CIRCUIT

BRIEF FOR PETITIONER

OPINION BELOW

The opinion below (R. 29) has not yet been reported.

JURISDICTION

The judgment below is dated and was entered on July 8, 1966 (R. 50). The petition for certiorari was filed on August 12, 1966 and was granted on November 7, 1966 (R. 51). The Court has jurisdiction under Title 28, U.S.C. § 1254(1)

QUESTIONS PRESENTED

The judgment below affirmed an order of the Board of Immigration Appeals ordering the deportation of petitioner under Sec. 241(a)(1) of the Immigration and Nationality Act of 1952 as an excludable alien under Sec. 212(a)(4) on the alleged charge that at time of entry he was "afflicted with a psychopathic personality", to-wit—homosexuality. The questions presented are:

1. Whether Sec. 212(a)(4) as here applied to petitioner deprived him of his constitutional guarantee of due process of law.

2. Whether Sec. 212(a)(4) is being unlawfully used here as a means to effect petitioner's deportation for a ground that is not authorized by statute.

3. Whether in this deportation proceeding respondent may establish its case against petitioner by a lesser standard of proof than is statutorily required in an exclusion proceeding on the same charge.

4. Whether it was error to hold that the statutory term "afflicted with a psychopathic personality" are words of legal art, disassociated from medical nomenclature, that automatically includes any practice of homosexuality.

STATUTES INVOLVED

The relevant provisions of the Immigration and Nationality Act of 1952 (66 Stat. 163; Title 8 U.S. Code), provide in part:

"Sec. 212(a)(4) [8 U.S. Code § 1182]:

(a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

* * *

(4) Aliens afflicted with psychopathic personality epilepsy, or a mental defect.

Sec. 234 [U.S. Code § 1224]:

The physical and mental examination of arriving aliens (including alien crewmen) shall be made by medical officers of the United States Public Health Service, who shall conduct all medical examinations and shall certify, for the information of the immigration officers and the special inquiry officers, any physical and mental defect or disease observed by such medical officers in any such alien. * * * Aliens (including alien crewmen) arriving at ports of the United States shall be examined by at least one such medical officer or civil surgeon under such administrative regulations as the Attorney General may prescribe, and under medical regulations prepared by the Surgeon General of the United States Public Health Service. Medical Officers of the United States Public Health Service who have had special training in the diagnosis of insanity and mental defects shall be detailed for duty or employed at such ports of entry as the Attorney General may designate, and such medical officers shall be provided with suitable facilities for the detention and examination of all arriving aliens who it is suspected may be excludable under paragraphs (1) * * * (4) or (5) of Section 212 (a) * * *. Any alien certified under paragraphs (1), (2), (3), (4) or (5) of section 212(a) may appeal to a board of medical officers of the United States Public Health Service, * * * and any such alien may introduce before such board one expert medical witness at his own cost and expense.

Sec. 241(a)(1) [8 U.S. Code § 1251(a)(1)]

(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;

STATEMENT OF THE CASE

Petitioner, who has been a resident of this country, for some ten years, has been ordered deported. The order is based on a finding that he was excludable at the time of his entry as a person "afflicted with psychopathic personality", to wit-a sexual deviate. This finding in turn rests solely on testimony of the petitioner that he had engaged in homosexual practices before and after entry (R. 20).

The term "psychopathic personality" is not defined in the statute; the terms "homosexual" and "sexual deviate" are not even mentioned. Nevertheless, admittedly, it has been the practice of the respondent over a number of years to equate all homosexual behavior with a "psychopathic personality". (R. 28) In pursuance of this practice, petitioner was ordered deported (R. 27) and the petition for review of such order was dismissed by the court below.

The facts of the case are as follows: Petitioner is a Canadian national, now thirty-three years old. He was admitted to this country for permanent residence in June 1955 at which time he was 21 years of age. He has lived here ever since, working steadily and at all times self supporting. With the exception of one sister and brother, his family of six siblings lives in the United States, as do his mother and stepfather, with whom he resides in New York City. (R. 21) He has never been convicted of crime. However, in 1959 he was arrested at home on a charge of sodomy under the New York Penal Law which was subsequently reduced to simple assault and ultimately dismissed for failure of the complainant to prosecute. (R. 17-18)

Upon an application for citizenship in 1963 petitioner candidly informed the naturalization examiner of the aforesaid arrest. This information was relayed to the Immigration Service whereupon petitioner was directed to appear at the office of the Service on January 13, 1964

Unrepresented by counsel, and not advised of his right to be so represented[1] (R. 1) he was interrogated by an immigration inspector about his sexual experiences both before his entry and during the eight years subsequent thereto. He again frankly admitted having had homosexual experiences about three or four times a year from age sixteen until twenty-one, during which time he also engaged in heterosexual practices. He was also questioned at length about post-entry homosexual behavior and he told of having had such relations, also, approximately three to four times a year in the post-entry period. (R. 7)

The Immigration Service submitted the statement containing petitioner's answers to these questions to the Public Health Service. Solely upon this statement of homosexual experiences before and principally after entry, and without examination of petitioner or medical evidence of any kind, doctors of the Public Health Service certified within four days of the making of the statement, that at the time of his entry in June 1955 — some nine years earlier — petitioner was a "psychopathic personality", to wit: a sexual deviate. (R. 11)

A year later, January 1965, respondent initiated deportation proceedings against petitioner.[2] In these proceedings, the only medical evidence relating to his con-

---

[1] The opening question of the investigator (R. 1) discloses that petitioner was not advised of his right to counsel or that he need not answer any or all of the questions put to him. The drastic penalty and consequences that attend deportation impel the application of the same essentials to a fair trial as obtain in a criminal prosecution. *Bridges v. Nixon*, 326 U.S. 135, 154 *Barber v. Gonzales*, 347 U.S. 637, 642. The failure to advise petitioner of his right to counsel is a denial of due process of law. *Massiah v. U.S.* 377 U.S. 201; *Escobedo v. Illinois*, 378 U.S. 478; *Miranda v. Arizona*, 384 U.S. 436.

[2] Order to Show Cause was dated January 28, 1965; it was served upon petitioner February 4, 1965 and hearings were held March 8, 1965 and July 26, 1965. (R. 16)

dition was submitted by the petitioner. It consists of two clinical reports of two practicing psychiatrists who examined him at different times, a year apart, and in which each states his opinion to be that petitioner is not a "psychopathic personality". (R. 12-16)

No evidence of any kind was submitted by the respondent as to the physical, mental or psychiatric condition of petitioner at the time of his entry in 1955 or at the time of the hearing in 1965. Instead, it was stipulated (1) that petitioner had not been examined by the Public Health Service; (2) that the reports of Dr. Falsey and Dr. Ullman, the psychiatrists who had examined petitioner, had not been considered by its doctors in making their certification; and (3) that if a Public Health Service doctor were called to testify, he would state that regardless of what an examination by him of petitioner would have disclosed, and notwithstanding the opinion of the two psychiatrists, the said doctor, "would be required to certify that he (petitioner) was a 'psychopathic personality' within the meaning of the Public Health Regulations" (R. 19) and that this "has in fact been their testimony in all the similar cases where they have appeared for cross examination." (R. 25)

The sole evidence presented by the respondent was the aforesaid statement of questions and answers and the certification of the Public Health Service based thereon.

This is the record upon which petitioner has been found deportable by the Special Inquiry Officer. The appeal therefrom to the Board of Immigration Appeals was dismissed on January 12, 1966, holding:

> We * * * think it proper to sustain the charge here upon proof of the existence of only a homosexual condition. (R. 28)

The court below (Judge Moore dissenting) dismissed the petition for review of the order of deportation. In doing so, the court rested on the following propositions, each of which petitioner urges is erroneous:

(1) That while petitioner could not have been excluded from this country on entry without the medical, physical and psychiatric examination statutorily mandated, he can now be deported on the ground that he was excludable, without such examinations having been had then or now; (R. 35)

(2) That the term "psychiatric personality" employed in the exclusion statute is a term of art to be interpreted to mean homosexuals, and that Congress so intended; (R. 38)

(3) That the exclusion statute read into the deportation statute as the basis for the order of deportation was not unconstitutionally vague because it did not relate to petitioner's post-entry conduct but to his characteristics; (R. 41)

(4) That while the record on which deportation was ordered deals mainly with petitioner's post-entry sexual practices, there is not the slightest indication that the deportation order was based on anything other than his pre-entry condition. (R. 41)

SUMMARY OF ARGUMENT

The order of deportation herein should be vacated. It is basically the result of a profound error of fact which has resulted in a fundamental error of law in the interpretation and administration of the exclusion and deportation statutes involved herein.

The factual error lies in the assumption that homosexual behavior is per se evidence of a "psychopathic personality". The legal error flowing from this is the construction that the statutes in question mandate the deportation of an alien who is found to have engaged in homosexual practices. This error resulted in denying petitioner due process of law. The denial takes the following forms:

(1) While the statute reads and superficially is administered as relating to persons who, at the time of their entry to this country are suffering from some condition that can be medically diagnosed as "psychopathic person-

ality", it is in fact construed and applied as relating to persons who have engaged in homosexual practices, without regard to whether they are psychically induced or related. This dichotomy between the statutory text and its administration renders it constitutionally vague and uncertain and has deprived petitioner of due process.

(2) If the statute is to be interpreted as claimed by respondent, then by reason of the vagueness set forth above, it has failed to give adequate reasonable notice to petitioner that that is its meaning and thus deprived him of the opportunity to refrain from homosexual practices after his entry, which according to the statements of his doctors, he was well able to do. Thus, combined with the use of evidence of his post-entry conduct, the vagueness of the statute in this respect has denied him due process.

(3) To the extent that respondent has justified its construction and administration of the statute on the theory that "psychopathic personality" is a reasonable assumption that may be made from the fact of homosexual practices, such assumption is unfounded in fact and medical experience and therefore cannot be sustained.

(4) The claim that such construction and interpretation is carrying out the expressed intention of Congress is predicated solely on a single reference in a Senate Report accompanying a bill which never became law, and is negated by an objective examination of the legislative history of the several laws that have been enacted dealing with the same subject matter.

(5) As a result of its approach to the statute, respondent has failed to establish that petitioner is deportable. The alleged basis for deportation is that he was excludable. Admittedly, he could not have been legally excluded without having been examined by the Public Health Service with a right of appeal therefrom. Yet, he is now ordered deported as excludable without any such examinations and with the only medical evidence in the record negating that he is a "psychopathic personality".

(6) Stripped to its essentials, it becomes evident that petitioner is being deported because he was involved in homosexual experiences after his entry to this country. There is no statutory basis for deportation on such ground and this is, in fact, something illegally and arbitrarily created by the respondent.

ARGUMENT

Preliminary Statement

This is a proceeding in deportation. Constitutional guarantees of the Fifth Amendment attach thereto. *Sung v. McGrath*, 339 U.S. 33, 50. The fact that deportability is predicated upon an exclusion statute does not diminish or alter petitioner's right to due process of law. Petitioner, as a permanent, legally-resident alien, is entitled not to forfeit his residence and the opportunity to work and live in the United States upon an administrative ruling and procedure that violates due process. *Chew v. Colding*, 344 U.S. 590, 596-8; *Brownell v. Shung*, 352 U.S. 180, ftn. 182; *Jordan v. DeGeorge*, 341 U.S. 223, 231.

Section 212(a)(4) bars from admission to the United States aliens "afflicted with psychopathic personality". The respondent construes this phrase to include all persons who engage in homosexual acts regardless of whether such homosexual conduct is associated with psychopathology and without proof that the alien is a psychopathic personality (R. 28). The respondent justifies such interpretation and enforcement of the section as effectuating Congressional intent. (R. 28-29)

Petitioner contends that the statute so construed and as applied to him deprived him of due process of law.

If, as respondent contends, Congress intended by this statute to include "homosexuals", it is nonetheless vague in language giving rise to constitutional infringement in its operation and application.

The source of the evil lies in an apparent belief that there is some kind of recognizable human being that is a "homosexual" — like one might recognize a "red-head". It is clear from the statement of Dr. C. R. Tripp, appended to this brief (supra pp. 43-51) that this is a mistaken notion. By and large homosexuality is a kind of behavior, evidently very wide-spread, and not the manifestation of a particular kind of person. It is because of this basic misconception of what homosexuality is, that vagueness and consequent constitutional violation has resulted. Respondent claims, and the court below agreed, that the statute aims at excluding *persons of certain characteristics*. The fact remains that in this and similar cases, it has administered the act as relating to *persons who have engaged in certain behavior*.

The court below in its opinion offers a classic example of this ambivalence. In countering petitioner's claim that the statute is void for vagueness, it says:

> But all this does not establish that section 212(a)(4) is defective under the void-for-vagueness doctrine. The provision was never designed to regulate *conduct;* its function was to exclude aliens possessing certain *characteristics*. (R. 41)

Yet, in note 15 to the opinion, apparently written some time later, it says:

> Congress studiously avoided turning this into a medical problem * * * rather, it enacted a clear-cut rule of law: It determined that pre-entry *homosexual behavior* was to be a ground for exclusion (italics ours) (R. 42)

In short, there is the automatic equivalence of behavior with characteristics.

The distinction here sought to be made can be more readily recognized if the instant situation is analogized to "kleptomania". That there are persons who steal because they are afflicted with some psychopathic disturbance is generally recognized.

> * * * "Kleptomania" is the scientific name for the disease of stealing. Persons who are victims of it will steal in spite of all restraints. (*State v. Reidell*, Del. 14 A. 550.)
>
> It is a species of mania, consisting of an irresistible impulse to steal. (*Lowe v. State*, 70 S.W. 206; 44 Tex. Cr. R. 224.)

Had Congress legislated to exclude persons called "kleptomaniacs" we would have a situation analogous to that here presented were that law administered as the existing law is with respect to persons who have engaged in homosexual conduct. For then, respondent would exclude as "kleptomaniacs" all persons who pilfer, shop-lift or steal without regard to whether such acts are "irresistible" or "in spite of all restraint". Obviously, not everyone who steals is a kleptomaniac — a person suffering from some mental disorder. Equally, not everyone who engages in a homosexual act is suffering from a psychopathic disorder.

Because of the basis misconception here described, the language of the statute is vague and uncertain; it has been improperly construed and applied by respondent to petitioner and resulted in the denial to him of due process.[3]

---

[3] " * * * we do not here question the power of Congress to define deportable conduct. We only question the power of administrative officers and courts to decree deportation until Congress has given an intelligible definition of deportable conduct." (Dissenting opinion of Mr. Justice Jackson, *Jordan v. DeGeorge*, 341 U.S. 223, 245)

I

The Relevant Statutes as Here Construed and Applied Denied to Petitioner Constitutional Due Process of Law.

Constitutional due process is embedded in the fundamental idea of fairness and fairplay essential to the very concept of justice. *Lisemba v. California*, 314 U.S. 219, 236. Basic to it is the requirement that legislation be definite and certain so that men of common intelligence will know what conduct is being commanded or forbidden without having to speculate or guess as to its meaning and as to its implications. *Connally v. General Construction Co.*, 269 U.S. 385, 391; *Cline v. Frink Dairy Co.*, 274 U.S. 445, 458; *Cramp v. Board of Public Instructions*, 368 U.S. 278, 287; *United States v. Harriss*, 347 U.S. 612. It requires that an inference or presumption created by the legislature be rationally connected in common experience to the ultimate fact to be established. *Tot v. United States*, 319 U.S. 463, 468.

(a) *The Statute Is Vague and Is Not Administered in Accordance With Its Language.*

As stated, the exclusion statute makes no mention of homosexual practices as a ground therefor. It does not even mention sexual deviation in general. Yet, respondent claims that such conduct is what is meant by "afflicted with psychopathic personality", the only term used in the statute, but which is undefined and whose meaning is vague.[4]

---

[4] *Noyes, Modern Clinical Psychiatry*, 3d ed. 1941, 410: "Psychopathic personality * * * is considered by many to be a meaningless designation * * * not yet is there any common agreement * * * as to classification or * * * etiology."

Guttmacher, Diagnosis and Etiology of Psychopathic Personalities as Perceived in Our Time, in *Current Problems in Psychiatric Diagnosis*, (Hoch & Zubin, ed. 1953) 139, 154: "At present, the diagnosis of a psychopathic personality is practically meaningless."

See also appended statement of Dr. Tripp. (infra, pp. 47, 48)

However, it is urged that the term is vague only if it is considered as a medical term. Respondent insists, and the court below has accepted, that while the language of the statute is medical in form, it was "employed as a term of art" (R. 36) and really means sex deviate. But explanation is also lacking of what makes the term "sex deviate" specific, if that is what the statute means.

The fact, nevertheless, is that the term *is a medical one* and the statute has meaning and can be administered only if it is given a medical meaning. Vague as it is, it can only be defined medically.[5] That Congress regarded it as a medical term is apparent for it appears in the statute in a subdivision which includes persons afflicted with other maladies:

> aliens afflicted with psychopathic personality, epilepsy, or mental defect. (§ 212(a)(4))

The Senate report[6] on which reliance for the "term of art" theory is placed speaks of the Public Health Service as having advised the use of that term (R. 37). Admittedly, an entering alien cannot be excluded on this ground without a medical examination and certificate of his excludability by the Public Health Service (Sec. 234, 8 U.S.C. 1224). (Supra, p. 3; R. 34-35) In this case and in other deportation cases involving the same issue, respondent invariably sought and received certification that the alien was a sex deviate from the Public Health Service. (R. 11) In this very case, while the court below accepted the "term of art" theory (R. 32), it endeavored to cover it up by stating:

---

[5] *Webster's Third New International Dictionary* (1961) p. 1833 defines the word as follows:

Psychopathic - relating to or characterized by psychopathy;
Psychopathy - mental disorder.

Funk and Wagnalls College Standard Dictionary (1941) p. 918: psychopathy - mental derangement, especially as apart from disease of the brain.

[6] S. Rept. No. 1137, 82d Cong., 2d Session

> Immigration officials dispatched this second and more complete statement [of petitioner] to the United States Public Health Service for its *expert* views * * * . (R. 32) (italics ours)

(What expert view could it render other than a medical opinion)

Thus by actual language and actual practice, the statute is treated as dealing with persons who have a medical problem. And the fact is that the statute can only be administered intelligently and meaningfully if made applicable to persons who are *medically* found to be afflicted with "psychopathic personality." Yet, in spite of this, respondent insists the statute is intended and must be construed to apply to all persons who have engaged in homosexual conduct, irrespective of any medical infirmity.

It is the considered opinion of many psychiatrists that homosexual behavior is not necessarily an indication of psychotic disturbance and that no inference of impairment may reasonably be made from such behavior. Indeed, this opinion is shared by Dr. Smith, chief psychiatrist for the Public Health Service, the very physician who certified petitioner without examination to be a "psychopathic personality".[7]

Respondent, in administering this statute rides two horses. One consists of treating the statute as if it applied to persons afflicted with a psychotic condition; when that is challenged for lack of proof, it mounts the other horse, saying, in the words of the Court below, Congress did not intend it "to be left to the vagaries of honest but conflicting theories of psychiatry for determination", (R. 36) but that it applies to everyone who had homosexual experiences.

---

[7] R. 39, footnote 11

(b) *The Statute Is Vague in Failing To Adequately Apprise Its Meaning To Be as Contended by Respondent, if That Is Its Meaning.*

If the term "psychopathic personality" in the statute is merely a euphemism for "homosexual" as respondent claims, then the problem of vagueness arises. The problem thus created is two-fold: *first,* the exclusion statute failed to apprise petitioner at the time of entry of what respondent now claims made him then excludable; *second,* it failed to apprise him that his post-entry sexual behavior could be made the basis for his expulsion from this country. There was nothing on the face of the statute to have advised petitioner when he sought to enter that it meant not what it says, but what respondent now says it means. Moreover, the visa application which he was required to execute and which lists the classes of persons who are statutorily excludable does not include sexual deviates, or persons who have had homosexual experiences; it does not even refer to psychopathic personalities.[8] Granted petitioner is presumed to know that the statute made excludable persons afflicted with psychopathic personality, he cannot be charged with knowing what is not a fact — that indulgence in homosexual conduct means one is so afflicted. Eminent psychiatrists beginning with Sigmund Freud have made that clear.[9]

Exhibit 4 (R. 11) shows that the classification of petitioner as an alien afflicted with psychopathic personality at the time of entry in 1955 was made by the Public

---

[8] The pertinent questions of the visa application (Nos. 37 and 38) signed by petitioner are appended hereto. (Pp. 37-39)

[9] "Homosexuality is assuredly no advantage, but it is nothing to be ashamed of, no vice, no degradation, it cannot be classified as an illness; we consider it to be a variation of the sexual function produced by a certain arrest of sexual development." ("Letter to an American Mother", by Sigmund Freud, American Journal of Psychiatry, Vol. 107, April 1951; reprinted in The Problem of Homosexuality in Modern Society, edited by Hendrik M. Ruitenbeck, E. P. Dutton, 1963.)

Health Service some ten years after the fact and is based solely upon petitioner's admissions to the respondent of homosexual practices, largely during that ten year period. Theoretically, the post-entry conduct is not the ground for his deportation but it cannot be gainsaid that it is being used as persuasive evidence to establish the condition at entry upon which deportability now is predicated.

The constitutional significance of this use of the post-entry record of petitioner's homosexual practices is that they may well have been avoided had he been informed by the statute that they could be used to establish a pre-entry condition of psychopathic personality. For there is nothing in the record to establish or even suggest that those experiences were compulsive in character and not merely a matter of choice. Dr. Montague Ullman, Director of Psychiatric Services in the Maimonides Hospital of Brooklyn and Professor of Psychiatry at the State University of New York examined petitioner. In his clinical report he stated:

> The patient has sexual interest in girls and has had intercourse with them on a number of occasions * * * His sexual structure still appears fluid and immature so that he moves from homosexual to heterosexual interests as well as abstinence with almost equal facility. His homosexual orientation seems secondary to a very constricted, dependent personality pattern rather than occurring in the context of a psychopathic personality. (R. 15, 16)

In *Fleuti v. Rosenberg*, 306 F.2d 652 remanded on other grounds, 374 U.S. 449, the Ninth Circuit, unlike the court below, held the statute to be unconstitutionally vague, in a case very similar to the present one. (Also in *Lavoie v. Immigration and Naturalization Service*, 300 F.2d 27; petition for certiorari pending No. 513) Dis-

cussing the use of post-entry conduct in that case [10] the court said:

> While the post-entry conduct was not itself the ground of deportation, but was used as evidence of a pre-entry condition, the prejudice would be substantial. The examiner might have found the evidence of pre-entry homosexual practices sufficient to support a finding of "psychopathic personality". But whether such a finding would have been entered in 1959, based on pre-entry conduct prior to 1952, or whether on such facts a charge would even have been brought, is a matter of speculation. The fact that the examining officer chose to rely heavily upon post-entry behavior is some indication that a charge might not have been filed, or a finding entered, on pre-entry behavior alone. (p. 656)

Where conduct is proscribed, or as here utilized as a basis for depriving one of his right to remain in the United States, substantive due process demands that the statute involved give him adequate notice, without requiring him to read legislative histories or to probe the mind of the legislators who enacted it. *United States v. Harriss*, 347 U.S. 612, 617. In the present case "neither the term 'psychopathic personality' nor its interpretations by the Courts prior to petitioner's entry gave petitioner 'sufficiently definite warning * * * when measured by common understanding and practices,' *Jordan v. DeGeorge*, 341 U.S. 223, 231-232, that his conduct could serve as a basis for exclusion or deportation". [11]

In *Fleuti*, the court, considering this aspect of the case, concluded:

> The conclusion is inescapable that the statutory term "psychopathic personality" when measured by common understanding and practices, does not

[10] This case also involved the subject alien's homosexual practice. The history of Fleuti's homosexuality covered 22 years, 1936-1959, with monthly indulgences and two convictions relating thereto. (Id. p. 655)

[11] Dissenting opinion below of Judge Moore. (R. 48)

> convey sufficiently definite warning that homosexuality and sex perversion are embraced therein. Since this statutory term thus fails to meet the test to be applied in determining whether a statute is vague in the constitutional sense, we hold that the statute is void for vagueness, as applied in this case. Enforcement of the order of deportation would therefore deprive Fleuti of the due process of law. (p. 658)

(c) *The Statute and/or Its Administration Rests on an Untenable Assumption.*

The contention of the respondent and its administration of the statute is based on the assumption that anyone who has engaged in homosexual acts is a "psychopathic personality", within the meaning of the statute. This contention is maintained in a context, where the statute makes no such automatic association, either in its text or by definition elsewhere in the law; where neither statute nor regulation places limitation or guide lines on the kind of homosexual behavior thus characterized, so that it may include persons who also engage in heterosexual acts, and persons whose homosexual practices vary from rare or infrequent to those who engage in it continuously and flagrantly.

This court has upheld the validity of statutes where guilt was predicated on an assumption, e.g. *United States v. Gainey*, 380 W.S. 63. But in all such cases, the test has been that the assumption be a rational one within common experience. The leading case of *Tot v. United States, supra*, where the presumption was found repugnant to due process, sets forth the rule:

> * * * the due process clauses of the Fifth and Fourteenth Amendments set limits upon the power of Congress * * * to make the proof of one fact or group of facts evidence of the existence of the ultimate fact on which guilt [deportability] is predicated.

> * * * Under our decisions a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience. * * * Where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them, it is not competent for the legislature to create it as a rule governing the procedure of courts. (pp. 647-648)

When the assumption is not legitimate, rational or reasonable, the statute making it will not be upheld, as it was not at the last term of the Court in *United States v. Romano*, 382 U.S. 136.

Here the statute does not make the assumption. It is made by the respondent in administering it, claiming that Congress intended it should. The assumption, however, is ill-founded, not rational and not within common experience. The extent of homosexual practices and its ubiquitousness alone is sufficient to negate it. For example, it was pointed out by Prof. Alfred C. Kinsey:

> In these terms (of physical contact to the point of orgasm) the data in the present study indicate that at least 37 percent of the male population has some homosexual experience between the beginning of adolescence and old age . . . This is more than one male in three of the persons that one may meet as he passes along a city street.[12]

Another authority, Prof. Robert Lindner, observed:

> One obvious reason for the neglect of so many persons is that inverts do not comprise a well-defined minority. This is to say that the homosexual is found on all levels of society, among all ethnic groups, in every station, occupation and calling.[13]

---

[12] *Sexual Behavior in the Human Male*, W. B. Saunders Co. 1948; Ch. 21, Homosexual Outlet, p. 623.

[13] *Homosexuality and the Contemporary Scene*, paper on The Problem of Homosexuality in Modern Society, ed. by Hendrik M. Ruitenbeck, p. 61; E. P. Dutton, 1963.

We have heretofore adverted to the fact that in the opinion of psychiatrists, including Dr. Smith of the Public Health Service, there is no necessary relation between homosexual behavior and "psychopathic personality". (supra) Dr. Smith in another case, testified:

> Dr. Snow (a witness for the alien) testified that a sexual deviate is not ipso facto either a constitutional psychopathic inferior or a psychopathic personality. He stated that in order to arrive at a medical finding that such a person is either a constitutional psychopathic inferior or a psychopathic personality there must be more than sexual deviation. . . Dr. Smith, who is a Senior Surgeon of the United States Public Health Service and a chief in Psychiatry at the United States Public Health Service Hospital at Staten Island, New York, testified that he is in complete accord with the medical opinion of Dr. Snow. (*In Matter of Anne-Lise Coppo*, file No. A-c845593, opinion of Special Inquiry Officer, Feb. 28, 1965, page 5)

When further asked to reconcile his certification of the subject alien as a "psychopathic personality" (in circumstances similar to the instant case) Dr. Smith stated "that as a qualified physician he was in full accord with the opinion of Dr. Snow and with modern psychiatric theory, but that, as an employee of the United States Public Health Service, he was bound by any instruction of the organization addressed to its employees". (*Id.* p. 6)

The administration of the statute on respondent's theory that "psychopathic personality" can be assumed from evidence of homosexual practice is not warranted by the facts of life or common experience. Such application to petitioner denied him due process of law.

(d) *Congressional Intent Cannot Be Used To Defeat Due Process of Law.*

The Court below (Judge Moore dissenting) never came to grips with the underlying constitutional question of due process: the vagueness and indefiniteness of Section 212(a)(4) leading to its improper administration; the fail-

ure of the statute to give notice of its meaning as contended by respondent; the unreasonable creation of a presumption of the ultimate fact of psychopathic personality. These were treated peremptorily because, essentially, the Court below believed:

> * * * that the clear design of Congress was to exclude homosexuals from entry into the United States and this has been done in Section 212(a)(4) by the use of the words "psychopathic personality" (R. 42).

This is not a permissible answer when the validity of a statute is constitutionally challenged. Due process of law may not be avoided by recourse to legislative intent. The statute must be judged on its face. A statute which is in conflict with the constitution is invalid regardless of the intentions of the legislature enacting it, and regardless of the fact that it may be based on strong considerations of public policy. *United States v. Harriss* (supra, 617), *United States v. Spector*, 343 U.S. 169, 172.

Section 212(a)(4) as it affected and was applied to petitioner deprived him of due process of law in violation of the Fifth Amendment to the Constitution.

II

The Order of Deportation Is Invalid; It Rests on an Erroneous Construction of the Term "Psychopathic Personality" in Section 212(a)(4).

Respondent's contention that the term "afflicted with psychopathic personality" is a term of art intended by Congress to include all homosexual behavior is based wholly upon a report of the Senate Judiciary Committee[14] containing the following language:

> The Public Health Service has advised that the provision for the exclusion of aliens afflicted with psychopathic personality or a mental defect which appears in the instant bill is sufficiently

---

[14] Senate Report #1137 (82d Cong., 2d Sess. 1952) p. 9

> broad to provide for the exclusion of homosexuals and sex perverts. This change of nomenclature is not to be construed in any way as modifying the intent to exclude all aliens who are sexual deviates.

The report accompanied Senate Bill S. 2550 (82d Cong 2d Sess.); it was not adopted by the Senate. Four of the thirteen Committee members had dissented and had filed a minority report.[15] Hence, Senate Report #1137 upon which respondent relies to transform "psychopathic personality" from a medical term into a term of legal art, is not the expression of Congressional intent bottoming Section 212(a)(4). The Senate bill and the report were both replaced by House Bill H.R. 5678 which was enacted and House Report #1365. Thus, the latter is the official legislative report for the Immigration and Nationality Act of 1952,[16] and that report does not reflect the House Committee's understanding of the term "psychopathic personality" to embrace all homosexual practices.

The legislative background and history of the section discloses no Congressional intent to give the term special meaning as words of *art* or that it was being used in a sense other than what its common meaning was in the medical profession.

The history begins with the Act of February 5, 1917[17] when Congress expanded the classes of excludable aliens to include "persons of constitutional psychopathic inferiority". The report that accompanied the 1917 bill explained:

---

[15] The minority report stated "We respectfully disagree with the majority report of the Committee of the Judiciary . . . S. 2550 is a bill which . . . in fact incorporates within its 302 pages hundreds of highly controversial provisions which require much more careful study and consideration by the members of the Committee than was possible under the circumstances."

[16] U.S. Code, Cong. & Adm. News, 82d Cong., 2d Sess. (1952) p. 1653.

[17] 39 Stat. 875

> The real object of excluding the mentally defective is to prevent the introduction into the country of strains of mental defect that may continue and multiply through succeeding generations. * * * *This change was made after consultation with persons of knowledge and experience.* * * * (emphasis added) [18]

From the above it is clear that at the very outset Congress knowingly employed medical terms to describe medical affliction to be excluded. It used a term that was then understood in the medical profession to denote a constitutional pathological condition.

As medical knowledge broadened — particularly in the field of psychiatry — the physicians of the Public Health Service encountered increasing difficulty in classifying as excludable psychopathic conditions in terms of "constitutional psychopathic inferiority". [19]

In 1947 Congress passed Senate Resolution #137 [20] "to make an investigation of the immigration system". Pursuant to the resolution "an intensive investigation and study of our entire immigration and naturalization system was made over a course of two and one-half years," culminating in April 1950 in Senate Report #1515 and Senate Bill S. 3455.[21]

---

[18] Senate Report #1515, 81st Cong., 2d Sess. (1950) p. 338

[19] Dr. G. L. Dunnahoo, Chief, Div. of Foreign Quarantine, USPHS, in INTERPRETER RELEASES, Vol. XXXVIII, No. 35, Aug. 7, 1951, p. 225: "The statutory term 'constitutional psychopathic inferiority' has no exact counterpart in present medical or psychiatric terminology. However, with certain limitations the term 'psychopathic personality', with its various subcategories, would seem to have the same meaning. In the classification of conditions under this category the word 'constitutional' is important. This term implies that the psychopathic inferiority was present at birth".

[20] 80th Cong., 1st Sess. (1947)

[21] Supra, note 18

Chapter IV, Subsection 4 of that Report is entitled: MEDICAL EXCLUSION [of aliens]. It is a discussion of Medical problems under the 1917 law. The report stated

> * * * the chief difficulties in the administration of the exclusion clauses of the 1917 Act pertaining to mentally and physically defective aliens arise in diagnosing "constitutional psychopathic inferiority". (p. 343)

It was recommended that:

> The present clauses excluding mentally and physically defective aliens, with three exceptions, are sufficiently broad to provide adequate protection to the population of the United States without being unduly harsh or restrictive. The subcommittee believes, however, that the purpose of the provision against "persons with constitutional psychopathic inferiority" will be more adequately served by changing that term to "persons afflicted with psychopathic personality", and that the classes of mentally defectives should be enlarged to include homosexuals and other sex perverts. (p. 343)

It is inescapable that the term "psychopathic personality", used for the first time in a Congressional report, was not being employed as a term of *art*. The report was describing *medically* those maladies to be excluded. Regardless of etiology — whether a constitutional inferiority or a psychopathic personality — its manifestation as a psychopathic condition or mental defect made it excludable. The "homosexuals and other sex perverts" referred to are those who are medically ill, that is, *sexuality that is pathologic.*

Senate Report #1515 accompanied Senate Bill S. 3455. Listed among the classes to be excluded were: (1) "aliens afflicted with psychopathic personality", and (2) "aliens who are homosexuals or sex perverted". It may be argued that this separate and specific classification showed an intent to exclude *all* homosexuals. If so, it equally evidenced a Congressional understanding that the term "psychopathic personality" was a medical classi-

fication — not a term of art — and did not include all homosexuals, at most only such of them as were psychopathic. Senate Bill 3455 was not adopted.

The bill was redrafted and in 1951 became S. 716 (82d Cong., 1st Sess.). Its counterpart in the House was H.R. 2379. The House Judiciary Committee submitted H.R. 2379 to the Public Health Service for opinion of its medical proposals for exclusion. The bill provided, *inter alia*, for the exclusion of the following aliens:

> "(1) Aliens who are idiots, imbeciles, *feeble minded*, epileptics or insane; (emphasis added)
>
> (2) * * *
>
> (3) Aliens afflicted with psychopathic personality
>
> * * *
>
> (7) Aliens who are homosexuals or sex perverts."

On May 15, 1951 the Public Health Service replied to the House Judiciary Committee with its "Report ON THE MEDICAL ASPECTS OF H.R. 2379." At the outset it suggested:

> that the language of the bill would be more clear if those items . . . of section 212(a), which are conditions related to the field of mental disorders and subject to medical determination, be grouped together, and that items . . . relating to paupers, etc. be placed in the group not subject to medical determination. Such grouping of the classes of excludable aliens would have a more appropriate relationship. (U.S. Code Cong. & Admin. News (1952) p. 1700)

The Public Health Service approved for exclusion item (3) — "psychopathic personality" as a term more properly describing the ailments to be affected. The report stated:

> . . . The conditions classified within the group of psychopathic personalities are, in effect, disorders of the personality. They are characterized by developmental defects or pathological trends in the personality structure manifest by lifelong patterns of action or behavior, rather than by mental or

> emotional symptoms. Individuals with such a disorder may manifest a disturbance of intrinsic personality patterns, exaggerated personality trends, or are persons ill primarily in term of society and the prevailing culture. The latter or sociopathic reactions are frequently symptomatic of a severe underlying neurosis or psychosis and frequently include those groups of individuals suffering from addiction or sexual deviation. Until a more definitive expression can be devised, the term 'psychopathic personality' should be retained. (*Id.* p. 1700)

With respect to item (7): "homosexuals or sex perverts' the Public Health Service advised:

> * * *Ordinarily, persons suffering from *disturbances* in sexuality are included within the classification of *'psychopathic personality with pathologic sexuality'*. This classification will specify such types of pathologic behavior as homosexuality or sexual perversion which includes sexual sadism fetishism, transvestism, pedophilia, etc. (Id. p. 1701) (emphasis added).

The Public Health Service made no recommendation to eliminate said item (7). Rather, the suggestion implicit in its discussion is that *homosexuality and sex perversions that were pathologic and symptomatic of severe underlying neurosis or psychosis should be excluded,* and as to such afflictions they were already included in item (3) — "psychopathic personality".

In contrast, the Public Health Service directly recommended the elimination of the term "feeble-mindedness" in item (1) saying:

> Feeble-mindedness is an inclusive generic term represented by subclasses of idiots, imbeciles, morons, and border-line intelligence. * * * There is no point in retaining the inclusive generic term "feeble-minded. * * *" (Id. p. 1700)

Although H.R. 2379 did not pass, in 1952 the House Judiciary Committee introduced a new bill — H.R. 5678 — accompanied by House Report #1365 (supra, 22, ftn. 16), which incorporated the full report of the Public Health

Service of May 1951. The new House bill also took into account the thinking and suggestions of the Public Health Service Report. With deliberate selectivity it elected not to delete the term "feeblemindedness" as recommended by the Public Health Service because "of the existence of an extensive body of judicial administrative decisions pertinent to the meaning of the term 'feebleminded'".[22] On the other hand, it did accept the implied suggestion not to create a category that excluded all homosexuals, as had been proposed in the 1950 bill. It chose to have homosexuals considered within the framework of the term psychopathic personality — a medical term denoting a pathological condition. Clearly, had Congress intended to exclude every sexual deviation, whether or not it was pathologic, it would have rejected the thinking of the Public Health Service in this respect as it did with aliens who were "feebleminded", and it would have retained in the statute the separate and specific listing of "homosexuals or sex perverts".[23]

Judge Moore, in his dissenting opinion observed the wide-spread indulgence in homosexual experiences of the American male population. He noted:

> I cannot impute to Congress an intention that the term "psychopathic personality" in the 1952 Act amendments to the Immigration and Nationality Act be construed to cover anyone who had ever had a homosexual experience. (R. 45) [24]

---

[22] House Report 1365, p. 17

[23] After the *Fleuti* decision (supra) Congress amended the immigration law (Act of Oct. 3,1965, § 15(b), 79 Stat. 919). It is significant that Congress again chose not to use language including all homosexuals but rather merely amended Section 212(a)(4) limiting such exclusion to "aliens *afflicted with* psychopathic personality or *sexual deviation*". In any event, the amendment cannot establish in the prior law what Congress subsequently enacted. *Wong Kam Wo v. Dulles*, 236 F.2d 662 (CA-9)

[24] Indeed, it was understood by the Second Circuit to characterize "individuals who show a life-long and constitutional ten-

> * * * Indeed, so broad a definition might well comprise more than a few members of legislative bodies. (R. 46)
>
> * * * The term "sexual deviate" suggests someone with a long lasting and perhaps compulsive orientation towards homosexual or otherwise "abnormal" behavior. The Public Health Service report on which the House Judiciary Committee relied in its discussion of the bill as finally enacted, * * * indicates a narrower definition of the term "psychopathic personality". * * * This legislative history suggests that Congress contemplated an inquiry in each case, to be performed by skilled psychiatrists, into whether the homosexual activity of a given individual amounted to such a "disorder of the personality" as to constitute "psychopathic personality" (R. 46).

This court has held repeatedly:

> A restrictive meaning for what appear to be plain words may be indicated by the Act as a whole, by the persuasive gloss of legislative history or *by the rule of constitutional adjudication * * * that such a restrictive meaning must be given if a broader meaning would generate constitutional doubts.* (*U.S. v. Witkovich*, 353 U.S. 194, 199) (emphasis added)

The broader and undisclosed meaning of "psychopathic personality" which respondent has imposed upon petitioner generates constitutional doubts that the Court of Appeals for the Ninth Circuit felt impelled to sustain.

---

dency not to conform to group custom, and who habitually misbehave so flagrantly that they are continually in trouble with authorities." (*U.S. v. Flores-Rodriguez*, 237 F.2d 405, 411)

III

Respondent Has Failed To Establish That Petitioner Is Deportable.

The basis for this proceeding is that petitioner at the time of entry was excludable by the law existing at such time. Respondent has held that petitioner at that time was a person afflicted with psychopathic personality, to wit — sexual deviation and hence, presently deportable.

To establish that petitioner was excludable ten years ago, the proof must be no less than is required to establish that he would be excludable today if he were entering presently under the same law.

Respondent admits, and the court below accepts, (R. 34) that exclusion would have required a medical examination of the physical and mental condition of petitioner under section 234 of the Immigration and Nationality Act, and a certification by the Public Health Service of any defect based on such examinations. *United States ex rel Johnson v. Shaughnessy*, 336 U.S. 806. It is undisputed that there was no such examination of petitioner. The certificate of the Public Health Service was made solely on a reading of the question and answer statement of petitioner. (R. 11)

The interrogation of petitioner was by an immigration investigator whose inquiries were designed to elicit information as to his eligibility to remain in this country. This was not the kind of interrogation that a trained psychiatrist would conduct to determine the mental or psychiatric condition of the petitioner. Nothing was elicited or inquired into about his working and general living habits, his background and environment, or the variety of matters that would normally be of concern to a psychiatrist in evaluating a patient.

Upon this barren record, the certificate of the doctors of the Public Health Service was made. While they signed their names to the certification as physicians, the truth

of the matter is that in doing so they were not performing a professional act; they were acting as clerks certifying that they reviewed the petitioner's testimony and that since they found in it admissions of having engaged in homosexual acts prior to his entry to the United States this automatically made him a psychopathic personality, sexual deviate.

The court below, while recognizing the absence herein of a true medical certification made on actual medical examination, held that this is prescribed for *exclusions*, but no such requirement obtains for deportation. (R. 35) What the court glosses over is that the proof that petitioner was *excludable* requires at least the same proof that would have been required to *exclude* him. If he could not be excluded on the proof presented here, how can he be found deportable because he is excludable?

An attempt to overcome this is made by the suggestion that petitioner refused to be examined by the Public Health Service. (R. 18) This is no answer. Respondent conceded that such an examination would be futile for the regulations of the Public Health Service required the doctors to certify petitioner to be a psychopathic personality, irrespective of what their medical examination of him disclosed. (supra pp. 6, 20) Furthermore, in a deportation proceeding petitioner did not have to submit to physical examination. If that refusal resulted in respondent not having the required evidence to sustain the charge, its situation would be no different than had petitioner refused to answer the questions put to him and upon which answers this proceeding was predicated. He had been advised that his statement must be voluntary. (R. 1)

The position of the court below leads to the anomalous and incredible situation that a person who has lived here for ten years may be deported on a record on which he could not have been excluded. (Cf. U.S. ex rel Knauff v. Shaughnessy, 338 U.S. 537) Even were that a tenable position, the record does not support the order of depor-

tation. In the first place no credence was given to opinions of the two psychiatrists offered in support of petitioner. (R. 12-16) Assuming a basis for the presumption that "psychopathic personality" could be inferred from homosexual behavior, the statements of the doctors rebutted such presumption as to this petitioner. Yet, they were ignored by the Special Inquiry Officer and by the Board of Immigration Appeals (R. 23-29), in their determination. This is directly contrary to what the Board of Immigration Appeals itself said was required of it in *United States v. Murff*, 250 F.2d 436 (CA-2) where the court quoted from its opinion as follows:

> Since the question arises in deportation, as distinguished from an exclusion proceeding (citing U.S. ex rel Johnson v. Shaughnessy, 336 U.S. 806), the Board is required to evaluate all the evidence of record, including certificate of the Public Health Service and the evidence submitted by respondent, in determining whether the mental charge is sustained. (p. 438)

The evidence of homosexual acts by the petitioner prior to entry was meagre and fragmentary. It covered his adolescent years from sixteen to twenty-one. It cannot be doubted that petitioner's statements of post-entry homosexual experiences loomed large in the determination by respondent. But since the charge herein is that he was excludable, the only pertinent evidence that should have been considered was that of prior entry.

The court below was not unaware of the problem this presents and hastened to explain it away:

> In the case before us, however, while the Special Inquiry Officer credited Boutilier's sworn statement which described in detail the full history of his homosexual behavior, there is not the slightest indication that the Officer failed to understand that section 212(a)(4) was directed solely at a pre-entry condition. (R. 41)

The dilemma of the court, however, is that the Public Health Service certification states it is based on the en-

tire statement and *there is not the slightest indication* in the opinion of the Special Inquiry Officer that he did not consider or was not influenced by the statement of post-entry conduct. His enumeration and discussion of all the post-entry acts firmly establish the opposite. (R. 26)

It may be suggested that under the holding of *Powlowec v. Day*, 33 F.2d 267 (CA-2) post-entry testimony is permissible to establish an excludable condition at time of entry. The situation in that case, and the few others that have accepted its rationale is materially different from the case at issue. In *Powlowec*, sometime after entry, petitioner was confined to an insane asylum after showing signs of mental derangement. His ailment was diagnosed by physicians there as "dementia praecox, hetephenia". On this evidence it was certified that recovery was impossible and that he was constitutionally psychopathic at the time of entry. As the court viewed it:

> The question is whether there is any evidence that shows him to have a mental makeup which falls within the phrase used in the statute.
>
> . . . When that is so, their (aliens) inferiority necessarily antedates their arrival here, because it is inherent in their nervous structure. (p. 268)

Central to the court's decision was its understanding that it was dealing with an inherent, psychotic condition. The post-entry diagnosis was provoked by manifestations of mental derangement that could only be the reflection of a condition organic and constitutional.

The substantive difference between the cases is that in the present case there is no evidence by respondent as to petitioner's psychological or physical *condition*. The evidence is only of his behavior, that is, of a number of homosexual experiences.

Finally, respondent has failed to prove petitioner's deportability by "reasonable, probative and substantial

evidence" to the required degree of certainty "that is clear, convincing and unequivocal". *Sherman v. Immigration & Nationality Service*, ___ U.S. ___ (12/12/66) 35 Law Week, 4053, 4055-4056. The only evidence offered by respondent — other than the Public Health Service certificate (R. 11) was the sworn statement of questions and answers (R. 1) upon which the certification was based. The statement of petitioner was taken by an immigration inspector without counsel for petitioner present and without petitioner being advised of the significance of the interrogation and the desirability that he consult counsel before submitting to such examination, which he was told must be voluntary (R. 1). As previously noted, this was a denial to petitioner of due process and the statement should have been excluded from the record. (Supra, footnote 1, p. 5)

IV

Section 212(a)(4) Has Been Unlawfully Used Here as the Means To Effect Petitioner's Deportation for a Ground That Has Not Been Authorized by Statute.

The grounds for which an alien may be deported are enumerated in the Immigration law. They alone are the grounds for which forfeiture of a resident alien's right to remain in the United States may be exacted. They may not be enlarged by administrative discretion or interpretation. The rule of law was stated in *Atlantic Insurance Agency v. Jordan*, 299 F.2d 758, 761 (CA-DC):

> Mr. Justice Holmes made the point in *Geigow v. Uhl*, 239 U.S. 3, 9 (1915) that when an administrator is specifically authorized to act under particular and enumerated conditions, his authority is limited to the granted circumstances; indeed, spelling out the respects in which he may act is tantamount to a denial of his right to an excess of his power in non-specified particulars.

Homosexual conduct is not among the grounds specified for deportation under the statute; neither is "being

afflicted with psychopathic personality". The respondent seeks to deport petitioner today because it disapproves of his sexual conduct over the course of his residence in the United States. To effect his deportation Section 241 (a)(1) is utilized ostensibly (but not truly) for an excludable condition at the time of entry.

In reality, the respondent has insinuated into Section 241(a) an added ground for deportation, to wit: "homosexual behavior". For the record upon which the order of deportation herein is based deals largely with petitioner's homosexual conduct since entry; it is meagre, indeed, with respect to such behavior before that time. What does the record establish as to that?

When he entered this country in 1955, petitioner was a young man of twenty-one. There was nothing about him at that time to warrant the immigration authorities to exclude him as a "psychopathic personality" as the respondent now charges that he was. In fact, he has lived in this country over ten years and there is no medical history showing him to have been at any time during this period a "psychopathic personality".

Insofar as his sexual behavior prior to entry is concerned, petitioner testified that he had been heterosexual also. (R. 6) His homosexual behavior was summarized by the Special Inquiry Officer: "* * * from the age of sixteen to the date of his first entry into the United States, about six years later, he [petitioner] engaged in homosexual activities on an average of three to four times a year". (R. 26)

On the basis of these sporadic youthful homosexual experiences only, it is not established that petitioner at the time of his entry was a "homosexual" or a "sex deviate". See statement of Dr. Tripp (infra, pp.).

The statement of the petitioner, which is the only evidence in this proceeding, shows that the questions put to him were directed to and dealt largely with his behavior

in this country after he entered. (R. 7-8) Furthermore, there is nothing in the certification of the Public Health Service's doctor or in the decision of the Special Inquiry Officer to indicate what weight was given to the admissions of the pre-entry sexual acts, or if there would have been any difference in their conclusions had petitioner experienced but two homosexual acts per year prior to entry, or only one such act, or even none, so long as there was the testimony with respect to post-entry sexual behavior.

There can be little doubt that the reason for petitioner's deportation lies in his frank acknowledgment of post-entry homosexual practices over the years of his residence in the United States. As pointed out in Point III hereof, it cannot be urged that such testimony was pertinent in relation to his condition at entry.(Supra p. 32)

The controlling factor in the present case is that there is no evidence by respondent as to petitioner's psychological or physical *condition at any time*. The evidence is only of his behavior, that is of a number of homosexual experiences. Petitioner's post-entry behavior was not shown to be related to his mental or physical condition prior to entry. Thus, the deportation order rests primarily on the evidence of such behavior alone. Absent a statutory provision therefor, petitioner's post-entry activities cannot be made deportable conduct regardless of how censureable respondent believes it to be. The attempt to achieve such deportation through the means of Section 241(a)(1) is constitutionally impermissible as a usurpation of power and a denial of due process of law. *Geigow v. Uhl*, 239 U.S. 3, 9.

CONCLUSION

The judgment of the Court below should be reversed; the order of deportation herein should be declared invalid; and deportation proceedings against petitioner terminated.

Respectfully submitted,

BLANCH FREEDMAN
299 Broadway
New York City, 10007

ROBERT BROWN
305 Broadway
New York City, 10007

Attorneys for Petitioner

On the Brief
DAVID M. FREEDMAN
BLANCH FREEDMAN

APPENDIX A

Nos. 37 and 38 of Petitioner's Signed Visa Application. (Facsimile Hereto Attached)

37. I have had the following excludable clauses explained to me and state that I am not, except as hereinafter noted, a member of any one of the following classes of individuals excluded from the United States under the Immigration and Nationality Act: (1) persons who have had one or more attacks of insanity; (2) persons who are narcotic drug addicts or chronic alcoholics; (3) persons who are afflicted with tuberculosis in any form, leprosy, or any dangerous contagious disease; (4) persons afflicted with any other disease, physical defect or disability which is of such a nature as may affect such persons' ability to earn a living unless affirmatively established that they will not have to earn a living; (5) paupers, professional beggars or vagrants; (6) persons convicted of, or who have admitted committing, a crime involving moral turpitude, or committing acts constituting the essential elements of such a crime, with the exceptions noted in the Act; (7) persons convicted of two or more offenses for which the aggregate sentences to confinement actually imposed were 5 years or more; (8) polygamists, practitioners or advocates of polygamy; (9) prostitutes, persons who have engaged in prostitution, persons coming to the United States solely, principally or incidentally to engage in prostitution, procurers and persons attempting to procure, or persons who have procured or attempted to procure or import, prostitutes or persons for the purpose of prostitution or for any other immoral purpose, or persons who are or have been supported by or receive or have received the proceeds of prostitution, or persons coming to the United States to engage in any other unlawful commercialized vice; (10) persons coming to the United States to engage in any immoral sexual act; (11) persons coming to the United States to perform skilled or unskilled labor who do not meet the requirements of the Act; (12) persons likely to

become public charges; (13) persons excluded from admission and deported, or persons arrested and deported, or persons fallen into distress and removed, or persons removed as enemy aliens, or persons removed at Government expense, who do not have the Attorney General's permission to reapply for admission; (14) stowaways; persons procuring, or who have sought to procure, visas or other documentation, or who seek to enter the United States by fraud or willful misrepresentation of a material fact; (15) immigrants not possessing valid unexpired immigrant visas, reentry permits, border crossing identification cards or other documentation required by the Act, and a valid unexpired passport or other suitable travel document or document of identity and nationality; (16) quota immigrants possessing visas not issued in compliance with the quota provisions of the Act; (17) persons ineligible to citizenship of the United States, or persons who have departed from or have remained outside the United States to evade or avoid military training or service in time of war or national emergency; (18) persons convicted of a violation of any law or regulation relating to the illicit narcotics drug traffic or of any law or regulation governing commerce or manufacture of narcotic drugs as provided in the Act; (19) persons who seek admission from foreign contiguous territory or adjacent islands after arriving therein by nonsignatory or noncomplying transportation lines; (20) persons seeking to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States; (21) persons who are, or at any time have been, anarchists, Communists, or other political subversives, as specified in Sec. 212(a)(28) of the Act; (22) persons who after entering the United States probably would engage in activities prohibited by the laws of the United States relating to espionage, sabotage, public disorder, or in any other activity subversive to the national security, or engage in any activity a purpose of which is opposition to, control or overthrow of, the United

States Government by force, violence or other unconstitutional means, or join, affiliate with, or participate in the activities of any organization registered or required to be registered under Sec. 7 of the Subversive Activities Control Act of 1950; (23) persons accompanying other persons ordered excluded, deported, and certified to be helpless from sickness or mental or physical disability or infancy pursuant to Sec. 237(e) of the Act, whose protection or guardianship is required by the persons excluded and deported; (24) persons who at any time, knowingly and for gain, encouraged, induced, assisted, abetted, or aided any other alien to enter or try to enter the United States in violation of law.

38. I have had the exceptions to the foregoing excludable classes explained to me and claim to be exempt from exclusion on account of membership in the class or classes noted above because: I am not a member of any of the above mentioned classes.

45. [illegible] in the United States for the following period of time [illegible] during [illegible] violation:

Indefinitely | **Visits**

37. I [illegible] the following excludable clauses explained to me and state that I am not, except as hereinafter noted, a member of any one of the following classes of [illegible] excluded from the United States under the Immigration and Nationality Act: (1) persons who have had one or more attacks of insanity; (2) persons who are [illegible] drug addicts or chronic alcoholics; (3) persons who are afflicted with tuberculosis in any form, leprosy, or any dangerous contagious disease; (4) persons afflicted with any other disease, physical defect or disability which is of such a nature as may affect such persons' ability to earn a living unless affirmatively established that they will not have to earn a living; (5) paupers, professional beggars or vagrants; (6) persons convicted of, or who have admitted committing, a crime involving moral turpitude, or committing acts constituting the essential elements of such a crime, with the exceptions noted in the Act; (7) persons convicted of two or more offenses for which the aggregate sentences to confinement actually imposed were 5 years or more; (8) polygamists, practitioners or advocates of polygamy; (9) prostitutes, persons who have engaged in prostitution, persons coming to the United States solely, principally or incidentally to engage in prostitution, procurers and persons attempting to procure, or persons who have procured or attempted to procure or import, prostitutes or persons for the purpose of prostitution or for any other immoral purpose, or persons who are or have been supported by or receive or have received the proceeds of prostitution, or persons coming to the United States to engage in any other unlawful commercialized vice; (10) persons coming to the United States to engage in any immoral sexual act; (11) persons coming to the United States to perform skilled or unskilled labor who do not meet the requirements of the Act; (12) persons likely to become public charges; (13) persons excluded from admission and deported, or persons arrested and deported, or persons fallen into distress and removed, or persons removed as alien enemies, or persons removed at Government expense, who do not have the Attorney General's permission to reapply for admission; (14) stowaways; persons procuring or who have sought to procure, visa or other documentation, or who seek to enter the United States by fraud or willful misrepresentation of a material fact; (15) immigrants not possessing valid unexpired immigrant visas, reentry permits, border-crossing identification cards or other documentation required by the Act, and a valid unexpired passport or other suitable travel document or document of identity and nationality; (16) quota immigrants possessing visas not issued in compliance with the quota provisions of the Act; (17) persons ineligible to citizenship of the United States, or persons who have departed from or have remained outside the United States to evade or avoid military training or service in time of war or national emergency; (18) persons convicted of a violation of any law or regulation relating to the illicit narcotics drug traffic or of any law or regulation governing commerce or manufacture of narcotic drugs as provided in the Act; (19) persons who seek admission from foreign contiguous territory or adjacent islands after arriving therein by nonsignatory or noncomplying transportation lines; (20) persons coming to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare or security of the United States; (21) persons who are, or at any time have been, anarchists, Communists, or other political subversives, as described in sec. 212 (a) (28) of the Act; (22) persons who after entering the United States probably would engage in activities prohibited by the laws of the United States relating to espionage, sabotage, public disorder, or in any other activity subversive to the national security, or engage in any activity a purpose of which is opposition to, control or overthrow of, the United States Government by force, violence or other unconstitutional means, or join, affiliate with, or participate in the activities of any organization registered or required to be registered under Sec. 7 of the Subversive Activities Control Act of 1950; (23) persons accompanying other persons ordered excluded, deported, and certified to be helpless from sickness or mental or physical disability or infancy pursuant to Sec. 237 (c) of the Act, whose protection or guardianship is required by the persons excluded and deported; (24) persons who at any time, knowingly and for gain, encouraged, induced, assisted, abetted, or aided any other alien to enter or try to enter the United States in violation of law.

38. I have had the exceptions to the foregoing excludable classes explained to me and claim to be exempt from exclusion on account of membership in the class or classes noted above because:

I am not a member of any of the above mentioned classes.

[illegible] 50103

[illegible]

(Signature of applicant)

Subscribed and sworn to before me this 21 day of June

Fee No.

Hazel O. Briggs

United States Vice Consul.

APPENDIX B

Statement by
Clarence A. Tripp, Ph.D.

Curriculum Vitae

Born, Denton, Texas - 1919.

American Associate of Science degree, Rochester Institute of Technology, Rochester, N. Y. (1941)

Associated with National Psychological Association for Psychoanalysis, New York City. (1945-1947)

Consultant, Institute for Sex Research, Indiana University, Bloomington, Ind. (1948-1956)

Ph.D. degree in sociology and clinical psychology, New York University, New York City. (1957)

Clinical Instructor in Psychiatry, Downstate Medical Center, College of Medicine, State University of New York. (1955-1964)

Guest lecturer, School of Medicine, University of California, San Francisco, Calif. ("Sex Disorders in Clinical Practice; A course for Physicians".)

Private practice of psychotherapy. (1958 to date)

Author of a comprehensive study of male and female homosexuality (in preparation).

Homosexuality and Psychopathology
by
Dr. C. A. Tripp

Homosexual acts are those that occur between members of the same sex, just as heterosexual acts are those that occur between members of the opposite sex. While any sexual drive or response rests on a physiologic capacity to be stimulated or to respond sexually, it is the psychological conditioning of the individual that determines whether a particular kind of partner or situation

will elicit sexual interest. Since specific directional cues (what used to be called instincts) are lacking in man, young persons show a psychosexual neutrality that is reflected in their considerable catholicity of sexual response. (r, 4, 7 p. 258)* Any eventual directionality of response occurs as a result of "positive" conditioning toward certain kinds of objects (most frequently members of the opposite sex), and "aversion" conditioning toward objects that may be perceived as dissonant with the positively conditioned ones. This is not meant to imply that psychological conditioning occurs primarily as a result of overt sex experiences. A boy can come to admire (to the point of erotic response) certain qualities or attributes of members of either sex as a result of value judgments he has attained in the course of life experiences that may seem to have no sexual connotations at that time. (8)

Homosexual acts, then, are the result of learning in the same sense in which heterosexual acts are the result of learning. (7, p. 258, 10) Thus explanations of homosexual behavior in terms of underlying "degeneracy," "constitutional inferiority," "psychopathy" or "psychopathic personality" are inappropriate and consequently have been abandoned by medical and social science. For instance, all of these terms have been dropped as diagnostic categories from the STATISTICAL AND DIAGNOSTIC MANUAL of the American Psychiatric Association, officially adopted in 1951. (1)

The considerable emotional importance that has been attached to homosexual acts, and to persons discovered to be involved in them, has arisen for two apparent reasons. 1) Overt sexual activities of any sort tend to generate, in the associations of others, all or part of the emotion that would be involved in the actual acceptance or rejection of such activities. 2) The emotion aroused by the observation or the thought of any sexual activity is sharply intensified whenever that activity is, a) associated with powerful taboos, or b) when it appears dis-

*Numerical references in text refer to numbered bibliography following the statement.

sonant with "opposite" actions that are extremely attractive to the viewer, or c) when the action represents a surfacing of tendencies within the viewer that are held down by repressions he maintains against a secret readiness to respond in the same way.

One of the unfortunate results of this emotional charging of homosexual acts has been the widespread use of the word *homosexual* as a substantive noun referring to persons. (It is worth noting that during the 18 years of the Kinsey Research, during which Dr. Kinsey and his associates had occasion to use the word hundreds of times in their writings, lectures, and conferences, they never once used it as a substantive noun, nor as an adjective, to describe persons. Rather, they spoke only of *homosexual acts, homosexual responses,* or persons involved in the *homosexual,* etc. They strongly advised others to do the same.) (9, p. 617)

To speak of a person as "a homosexual" entails two troublesome distortions. 1) It amounts to classifying a person according to the sex of somebody else (the partner). 2) It implies that persons fall into categories of homosexual and heterosexual that are sharp enough to be used as classifications. The impact of this latter error is best appreciated if we use, as a general guide, the findings of the Institute for Sex Research which are, in part:

1) That a full 50 per cent of the adult white American male population admits some degree of erotic response to other males. (9, p. 656)

2) That 37 per cent of the adult white American male population has at least some overt homosexual experience after maturity. (9, p. 625)

3) That 10 per cent of white married males (25-year-old class) have at least some overt homosexual experience *after* being married. (9, p. 290, fig. 85)

4) That not more than 4 per cent of the total adult white American male population is exclusively in-

> volved with homosexuality — and, consequently, that nearly half (46 per cent) of the population falls into neither exclusively homosexual nor exclusively heterosexual categories. (9, p. 656)

Assuming the facts in the Boutilier case, to wit, that at age 14 he had his first homosexual experience, that such experiences occurred 3 or 4 times a year from age 16 to age 21, and that homosexual experiences (among others) have continued at this rate since his entry into this country, what classifications can and cannot be made? According to the data, Boutilier cannot be classed as either heterosexual or homosexual — particularly not at age 21 when these mixtures are especially common. Boutilier now falls into that 46 per cent of the population which shows a mixed sexual picture, and into the 37 per cent of the population that chooses to act-out some homosexuality. In no event can Boutilier be classed as "a homosexual" without violating part of his history, and/or forcing him into a category that would include a sizable portion of the whole white American male population.

There are, of course, instances in which homosexuality (and for that matter, heterosexuality) is associated with mental disorder — or with disturbances in a person's social behavior. Any piece of behavior that is taboo, or that is under tight social regulation, may be "thrown in the face of society" in the form of public displays by persons who have such poor "reality testing" that they simply do not know how to respect the surface demands of the society in which they live. Other individuals who perfectly well know the limits of social decorum, such as various "angry young men," may choose to flaunt taboo behavior as a means of expressing social protest. And still other individuals who are otherwise respectful of social rules may be so personally disturbed by their own tendencies, or by what they imagine to be giant differences between themselves and others, that they push forward some distorted fragment of this misinterpretation as an element of their own identity — as

seen, for instance, in the rare but dramatic display of the "painted fairy." But to confuse these sometimes psychotic or neurotic manifestations with examples of people who discreetly make similar sexual choices, but who are well-integrated socially in terms of meeting their material and social responsibilities, would be almost as serious as confusing rape with ordinary sexual intercourse.

In fact, it is part of the history of man's sexual interpretations that inconsequential events, masked by social taboos, at first seem to validate those taboos by appearing only in the bad company of anti-social behavior — eventually to be cleared of both their horror and importance by biologic and psychologic understanding. For instance, masturbation was thought for generations to be associated with mental disease because psychotic and mentally deficient persons were the ones seen doing it. After this illusion became apparent, there were various efforts to substantiate at least the abstinence part of the taboo. For instance, the American Medical Association adopted a formal resolution at its national convention in 1917 stating that there was "no evidence that abstinence from all sexual activity is inconsistent with the highest physical and mental efficiency." Today there is such evidence — coupled with a general understanding of the fact that the incidence rate on masturbation stands at not less than 96 per cent of the entire American male population. (9, p. 514)

Homosexuality has been subjected to approximately the same course of interpretation — from sharp taboo, to being associated with mental disease, to a general recognition of its commonplace frequency, and finally to its being seen as of small sociologic consequence, even though it may be of great personal importance to some of the participants.

The term "psychopathic personality" (including the variant nouns, "psychopath" and "psychopathy") is not now, and was not as far back as 1952, recognized as a

proper diagnostic category from which it could be inferred that such a person was engaged in homosexual conduct. (1) Just as a person involved in homosexual activities is not necessarily a psychopath, a psychopath is not necessarily involved in homosexuality. Consequently, explicit distinction between "psychopaths" and "real homosexuals". (2, p. 575)

The term "psychopath" has lingered on in the language of medicine and psychology in two main usages:

1) "Psychopath" survives as a general term denoting any kind of "mentally deranged person" (Oxford Universal Dictionary), or "an eccentric and queer person, one near the border of mental disorder" (6).

2) "Psychopath" is used as a global category to indicate behavior patterns characterized by general irresponsibility, unreliability, impulse-ridden social inadequacy, and an inability to distinguish between truth and falsehood.

It is this latter usage which governed the writing of the section on "Psychopathic States" in a standard reference work for psychiatrists and social scientists, the American Handbook of Psychiatry (2, pp. 567-588). The author states:

> "At a meeting of the American Psychiatric Association, or at a staff conference at a state hospital, if a physician expresses an opinion to one of his colleagues about a psychopath, it is clearly, and at once, understood that he is not speaking of a cyclothymic or schizoid personality or of ordinary homosexuality but of the grave character and behavior disorder so familiar to most psychiatrists as a distinct and easily recognized entity." (2, p. 568)

It is obviously with these distinctions and usages in mind that neither of the two psychiatrists who examined Boutilier found him to be afflicted with a psychopathic personality.

REFERENCES

1. American Psychiatric Association, Committee on Nomenclature and Statistics. *Diagnostic and Statistical Manual: Mental Disorders.* Washington: American Psychiatric Association, 1952.

2. Arieti, S., ed. *American Handbook of Psychiatry.* New York: Basic Books, 1959. Vol. I.

3. Beach, F. A. "A Cross-Species Survey of Mammalian Sexual Behavior." In: P. H. Hoch and J. Zubin, eds. *Psychosexual Development in Health and Disease.* New York: Grune & Stratton, 1949. Pp. 52-78.

4. Beach, F. A. "The Descent of Instinct." *Psychological Review,* 1955, Vol. 62, pp. 401-410.

5. Beach, F. A., ed. *Sex and Behavior.* New York: Wiley, 1965.

6. English, H. B., and English, A. C. *A Comprehensive Dictionary of Psychological and Psychoanalytical Terms; a Guide to Usage.* New York: Longmans, Green, 1958.

7. Ford, C. S., and Beach, F. A. *Patterns of Sexual Behavior.* New York: Harper, 1951.

   "Human homosexuality is not basically a product of hormonal imbalance or 'perverted' heredity. It is the product of the fundamental mammalian heritage of general sexual responsiveness as modified under the impact of experience." P. 259.

8. Gebhard, P. H. "Situational Factors Affecting Human Sexual Behavior." In: F. A. Beach, ed. *Sex and Behavior.* New York: Wiley, 1965. Pp. 483-495.

9. Kinsey, A. C., Pomeroy, W. B., and Martin, C. E. *Sexual Behavior in the Human Male.* Philadelphia: Saunders, 1948.

   "It is not possible to insist that any departure from the sexual mores, or any participation in socially taboo activities, always, or even usually, involves a neurosis or psychosis, for the case histories abundantly demonstrate that most individuals who engage in taboo activities make satisfactory social adjustments. There are, in actuality, few adult males who are particularly disturbed over their sexual histories. Psychiatrists, clinical

psychologists, and others who deal with cases of maladjustment, sometimes come to feel that most people find difficulty in adjusting their sexual lives; but a clinic is no place to secure incidence figures. The incidence of tuberculosis in a tuberculosis sanitarium is no measure of the incidence of tuberculosis in the population as a whole; and the incidence of disturbance over sexual activities among the persons who come to a clinic is no measure of the frequency of similar disturbances outside of clinics." P. 201.

"It would encourage clearer thinking on these matters if persons were not characterized as heterosexual or homosexual, but as individuals who have had certain amounts of heterosexual experience and certain amounts of homosexual experience." P. 617.

"The data indicate that about 10% of married males have some homosexual activities during marriage. That this figure drops after the age of 25 is probably a reflection of cover-up, for there is no evidence of any significant difference in homosexual frequencies from one generation to the next." P. 631.

"Males do not represent two discrete populations, heterosexual and homosexual. The world is not to be divided into sheep and goats. Not all things are black nor all things white. It is fundamental of taxonomy that nature rarely deals with discrete categories. Only the human mind invents categories and tries to force facts into separate pigeonholes. The living world is a continuum in each and every one of its aspects. The sooner we learn this concerning human sexual behavior the sooner we shall reach a sound understanding of the realities of sex." P. 639.

"The opinion that homosexual activity in itself provides evidence of a psychopathic personality is materially challenged by (our) incidence and frequency data. Of the 40 or 50% of the male population which has homosexual experience, certainly a high proportion would not be considered psychopathic personalities on the basis of anything else in their histories." P. 660.

"The homosexual has been a significant part of human sexual activity ever since the dawn of history, primarily because it is an expression of capacities that are basic in the human animal." P. 666.

10. Kinsey, A. C., Pomeroy, W. B., Martin, C. E., and Gebhard, P. H. "Concepts of Normality and Abnormality in Sexual Behavior." In: P. H. Hoch and J. Zubin, eds. *Psychosexual Development in Health and Disease*. New York: Grune & Stratton, 1949. Pp. 11-32.

11. *Oxford Universal Dictionary on Historical Principles*. 3d ed., revised with addenda. Oxford: Clarendon Press, 1955.

12. Szasz, T. S. "Legal and Moral Aspects of Homosexuality." In: Marmor, J., ed. *Sexual Inversion*. New York: Basic Books, 1965. Pp. 124-139.

"In the United States today, why is homosexuality a problem? Mainly because it presents, in sexual form, the classic dilemma of popular democracy: How much diversity should society permit? Many people, eminent psychiatrists among them, do not distinguish between democracy and what Tocqueville called 'the tyranny of the majority'." P. 137.

"In our day, homosexuality is a moral, political and social problem. It is not enough, therefore, for psychiatrists to concern themselves with abstract notions of psychosexual health and disease and to disregard the more general problem of conformity versus diversity in a complex human society. Coercive measures aimed at reducing diversity of opinion or action, whether in the sexual or in the intellectual sphere, are destined to constrict society and thus the human personality." P. 138.